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# NOTES

## THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT OF 1996: ISOLATIONIST OBSTACLE TO POLICY OF ENGAGEMENT

*Michelle Arendt\**

*"Of the proverbial thorns in the side of the United States, none has irritated as long or sometimes as much as Cuba."*

-L.D. Langley<sup>1</sup>

### I. INTRODUCTION

THE UNITED STATES HAS OFTEN ADOPTED an "isolationist" approach as a foreign policy mechanism to deal with nations engaging in undemocratic and repressive practices.<sup>2</sup> This isolationist approach is characterized by a "hard-line" policy that uses economic sanctions in the form of trade embargoes and reduces loans and economic aid to the targeted nation.<sup>3</sup> Additionally, isolationist policy may involve severing diplomatic relations with targeted nations.<sup>4</sup> The intention of this type of foreign policy is to

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<sup>1</sup> Lester D. Langley, *Cuba: A Perennial Problem in American Foreign Policy*, in FORUMS IN HISTORY 1,1 (Franklin D. Mitchell ed., 1973).

<sup>2</sup> For example, the United States has adopted this approach with China, South Africa, and Cuba. In a study done by the Institute for International Economics examining the history of sanctions in the twentieth century, researchers concluded the United States was the dominant user of sanctions. This conclusion was based upon numbers indicating that in 116 cases of sanctions being used in the twentieth century, the United States was the "primary sender" in seventy-seven of those cases. See *The Gulf War: The Law of International Sanctions*, 1985 AM. SOC'Y INT'L L. 169, 171 [hereinafter *Law of International Sanctions*] (remarks by Kimberly Ann Elliott); *id.* at 169 (remarks by Barry R. Campbell).

<sup>3</sup> See John W. Smagula, *Redirecting Focus: Justifying the U.S. Embargo Against Cuba and Resolving the Stalemate*, 2 N.C. J. INT'L L. & COM. REG. 65, 104 (1995).

<sup>4</sup> For example, shortly after Fidel Castro rose to power in Cuba, the United States officially terminated diplomatic relations with Cuba. See MAX AZICRI, *CUBA: POLITICS, ECONOMICS AND SOCIETY* 30 (1988). Additionally, as part of sanctions instituted against China's government after the Tiananmen Square massacre in 1989, the White House suspended all official exchanges with China above the level of Assistant Secretary. See

alienate the targeted nation so that it will feel pressured enough to make changes in the policies, government structure, or practices to which the United States objects. Although the United States has often favored this approach, it has also often been criticized for it. The isolationist embargo approach is not always successful in effecting changes of policy or government within the targeted nations.<sup>5</sup> Furthermore, these mechanisms can result in imposing additional hardships on the people of the targeted nation who may already have been suffering under a repressive government.<sup>6</sup>

The U.S. relationship with Cuba provides an illustrative example of the isolationist policy.<sup>7</sup> For over thirty years, the United States has estranged Cuba both economically and diplomatically with the intent of destabilizing the Castro-led government in order to establish a more democratic Cuban government. There has been much debate over whether such a policy should be continued.<sup>8</sup> Despite criticism from within the United States and censure from the global community,<sup>9</sup> the United States

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HARRY HARDING, A FRAGILE RELATIONSHIP: THE UNITED STATES AND CHINA SINCE 1972 226 (1992).

<sup>5</sup> See *Law of International Sanctions*, *supra* note 2, at 174 (remarks by Kimberly Ann Elliott).

<sup>6</sup> See *The Appropriateness of Continuing International Sanctions Against South Africa*, 84 AM. SOC'Y INT'L PROC. 307, 315 (1990) [hereinafter *Appropriateness of Sanctions*] (remarks by Roger Wilkins) (discussing the response to concerns about how sanctions were affecting the people of South Africa). See also HARDING, *supra* note 4, at 267 (indicating concern for the smaller, privately owned industries that would be hurt if the United States revoked China's Most Favored Nation trading status as a form of economic pressure on China to improve its human rights conditions).

<sup>7</sup> See Shari-Ellen Bourque, Note, *The Illegality of the Cuban Embargo in the Current International System*, 13 B.U. INT'L L.J. 191, 199 (1995).

<sup>8</sup> See Linda Robinson et al., *Cuba Takes a Stiff Belt*, U.S. NEWS & WORLD REP., July 29, 1996, at 36, 37. ("The debate over how best to change Cuba — more investment that would bring more foreign influence or more isolation in hopes of toppling Castro — has gone on for more than three decades"). See *id.* (noting that recently, with the passage of the Helms-Burton Act, this debate has been generating more heat).

<sup>9</sup> The United Nations General Assembly has condemned the United States for its embargo against Cuba. See Julia P. Herd, Note, *The Cuban Democracy Act: Another Extraterritorial Act That Won't Work*, 20 BROOK. J. INT'L L. 397, 430 (1994), available in WESTLAW, 20 BKNJIL 397. See also Avi Chomsky, *Why Does the U.S. Demonize Cuba?*, MAINE SUNDAY TELEGRAM, Sept. 15, 1996, at 1C. A spokesman for the E.U. has stated: "We share a desire to see democracy in Cuba, but the Helms-Burton Act, objectionable in principle, does not help cooperation." Reuters, *Envoy Fails to Sway E.U. on Anti-Cuba Laws*, SUN-SENTINEL (Ft. Lauderdale), Sept. 4, 1996, at 12A.

has continued to pursue its policy of isolating Cuba.<sup>10</sup>

In March of 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (Helms-Burton Act).<sup>11</sup> President Clinton was originally opposed to the Helms-Burton Act; however, early in 1996, the Cuban government piqued anti-Castro sentiments by shooting down two unarmed U.S. aircraft.<sup>12</sup> That event precipitated a compromise between Congress and President Clinton which led to enactment of the Helms-Burton Act.<sup>13</sup> This legislation is the most recent in a long line of actions the United States has taken to implement its isolation policy against Cuba.<sup>14</sup> Proponents of the Helms-Burton Act hope that it will resolve the long-standing dispute between the United States and Cuba over expropriated property taken by the Cuban government and initiate democratic reforms within the Cuban government.<sup>15</sup> The Helms-Burton Act is based upon isolationist tactics and attempts to compel other nations to cooperate with the U.S. efforts in Cuba. Critics of the Helms-Burton Act argue that its isolationist approach will not be successful in achieving U.S. goals in Cuba and, furthermore, that it will be costly to U.S. interests.<sup>16</sup> Opponents to the U.S. approach, as pursued through the Helms-Burton Act, urge the United States to pursue a policy of engagement with Cuba rather than isolation in order to achieve U.S. goals in Cuba with less costs to U.S. interests.

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<sup>10</sup> This continued pursuit of isolation is evidenced by the recent passage of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), 22 U.S.C.A. §§ 6021-6091 (West Supp. 1997), and is the focus of this Note.

<sup>11</sup> See *id.* The Act is commonly referred to as the Helms-Burton Act for its two sponsors, Republican Senator Jesse Helms and Representative Dan Burton, and it will be referred to as such herein.

<sup>12</sup> See Bruce W. Nelan, *Taking on the World*, TIME, Aug. 26, 1996, at 26.

<sup>13</sup> See Memorandum from Cleary, Gottlieb, Steen & Hamilton on the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act 1 (March 12, 1996) [hereinafter Cleary, Gottlieb] (on file with the editors); Robinson, *supra* note 8, at 36; 142 CONG. REC. 30, E308, (daily ed. Mar. 7, 1996) [hereinafter Rep. Reed] (statement of Rep. Jack Reed of Rhode Island).

<sup>14</sup> See, e.g., Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a) (1994); Trading With the Enemy Act, 50 U.S.C. app. § 5(B) (1994); Cuban Assets Control Regulations, 31 C.F.R. § 515 *et. seq.* (1996); Cuban Democracy Act of 1992, 22 U.S.C. § 6001-10 (1996).

<sup>15</sup> The Helms-Burton Act establishes a law under which United States expropriation victims may sue to obtain compensation for their expropriated property. The Helms-Burton Act also conditions relief from the embargo upon initiation of reforms in the Cuban government and upon active steps to repay U.S. citizens for their expropriated property. 22 U.S.C.A. §§ 6061-6085.

<sup>16</sup> See Rep. Reed, *supra* note 13, at E308.

This Note advocates that U.S. policy toward Cuba should move away from the isolationist approach, as exemplified by the Helms-Burton Act. The United States should pursue engagement of Cuba, as other nations have,<sup>17</sup> through investment and commerce, as well as more direct communications between the two governments. Part II briefly describes significant factors of the Cuban Revolution that created the hostile relations between the United States and Cuba stemming from isolationist policy. Part III discusses the Helms-Burton Act as a tool of isolationist policy. Title III of the Helms-Burton Act, which allows U.S. citizens to sue foreign corporations for benefitting from the use of expropriated property, deserves particular attention due to its extraterritorial implications and the angry reaction it has provoked from U.S. allies. Part IV examines the validity of the Helms-Burton Act under international legal principles. Part IV also discusses the shortcomings of the Helms-Burton Act and its detrimental impact on U.S. interests. Finally, Part V discusses engagement as an alternative means for the United States to work toward democratic reforms in Cuba that better serve U.S. interests. In order to enhance the discussion on engagement, Part V compares the Cuban problem to the problems in U.S. relations with both South Africa and China.

## II. BACKGROUND

In 1953, Fidel Castro launched the Cuban Revolution against the Batista military government.<sup>18</sup> Fidel Castro became Prime Minister of Cuba's revolutionary government on February 16, 1959.<sup>19</sup> During the

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<sup>17</sup> See, e.g., Merrill Goozner, *U.S. Law Fails to Scare Canada Firms Out of Cuba*, CHI. TRIB., June 16, 1997, at 4 (noting that trade and tourism between Canada and Cuba surged 11% last year to \$641 million (Canadian)).

<sup>18</sup> See AZICRI, *supra* note 4, at 24. Batista had been elected President of Cuba in 1940 under a constitutional government process he had helped to initiate. However, the 1940 Constitutional government ended after only twelve years because in March, 1952, Batista successfully carried out a military coup and established a military government. Batista's coup obstructed the Cuban People's Party (Ortodoxo), which Castro belonged to, from becoming the leading political party in the June, 1952 elections. Castro, who opposed the Batista government, launched a revolution which ultimately succeeded in defeating the Batista regime and taking power on January 1, 1959 when Batista and his family fled the country. See *id.* at 23-25.

<sup>19</sup> See *id.* at 29. Although it is not clear that the Cuban Revolution originally intended to establish a socialist system, particularly one that followed Marxist-Leninist theory, it quickly advanced in that direction. See also Wayne S. Smith, *U.S.-Cuba Relations: Twenty-Five Years of Hostility*, in CUBA: TWENTY-FIVE YEARS OF REVOLUTION, 1959-1984 333, 334-35 (Sandor Halebsky & John M Kirk eds., 1985) (stating, "[d]espite what he says today, Castro was not a Marxist-Leninist when he came to power"). But cf. AZICRI, *supra* note 4, at 29 (stating that while Revolutionary Cuba's

years prior to the Revolution, the United States dominated Cuba with its economic presence.<sup>20</sup> The United States intervened in Cuban affairs both politically, through military occupation, and economically, through U.S.-driven monopolies.<sup>21</sup> Cuba relied upon the United States not only for trade, but also for capital investment.<sup>22</sup>

The Revolutionary government not only made adjustments to the dependent nature of its economy through domestic policies, but also through foreign policy. One of the revolution's primary goals was to liberate Cuba from its economic dependence on the United States. In response to the revolution, the United States cut Cuba's sugar quota in the U.S. market to nothing.<sup>23</sup> Meanwhile, the Cuban government instituted a policy of collectivization that involved nationalizing property that belonged to Cubans and to foreign interests. Some of the nationalized property belonged to U.S. citizens.<sup>24</sup> In addition to the antagonistic effect these expropriations generally had on U.S.-Cuban relations, they also created numerous claims made by U.S. citizens, seeking compensation from the Cuban government for the property taken from them.<sup>25</sup>

At this point relations between the two nations were severed when, in January of 1961, President Eisenhower's administration ended both diplomatic and consular relations with Cuba.<sup>26</sup> As a result of these

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first and short-lived President of seven months made public statements about "the menace [C]ommunism could represent for the people's welfare and the revolution," other revolutionary leaders such as Castro "were thinking and planning quite differently"). By 1961 Castro had publicly declared a socialist revolution. *See Smith, supra*, at 337.

<sup>20</sup> *See Smith, supra* note 19, at 333.

<sup>21</sup> *See id. See also AZICRI, supra* note 4, at 37 (citing BOORSTEIN).

<sup>22</sup> *See AZICRI, supra* note 4, at 36-37 (outlining the U.S. influence on pre-Revolutionary Cuba). The United States owned 36.65% of Cuba's sugar mills as of 1958. These American-owned mills were expropriated by the Cuban government. *See id.* at 166.

<sup>23</sup> *See id.*

<sup>24</sup> *See id.* at 127-29.

<sup>25</sup> U.S. citizens may file claims against foreign governments for expropriated property under the authority of the International Claims Settlement Act of 1949, 22 U.S.C §§ 1621-1645 *et. seq.* (1994), and through the Foreign Claims Settlement Commission (FCSC). The FCSC is a branch of the Department of Justice, and its function is to determine the amount and validity of claims against foreign governments. Title V specifically authorizes the FCSC to certify claims against the Cuban government. *See Smagula, supra* note 3, at n.9. The number of original claimants against Cuba certified under the FCSC totals 5,911. *See The Cuban Liberty and Democratic Solidarity Act of 1995: Markup on H.R. 927 Before the Committee on International Relations*, 104th Cong. 18 (1995) [hereinafter *Markup on H.R. 927*] (statement of Ms. Patterson).

<sup>26</sup> *See AZICRI, supra* note 4, at 30.

hostile relations between the United States and Cuba, combined with economic pressure exerted by the United States and its allies on Cuba, the Cuban Republic was forced to look elsewhere to establish economic ties.<sup>27</sup> Those ties were made with the Communist Soviet Union.<sup>28</sup> The Soviet Union supplied Cuba with commercial trade and significant economic aid.<sup>29</sup>

The issues raised by the Helms-Burton Act arise from the policy that the United States adopted regarding Cuba in the wake of the revolution, one it has continued to maintain over the past thirty-five years. The policy is based upon the U.S. goal to isolate Cuba from the global community. The primary means the United States has used in attempting to effect this policy of isolation has been economic sanctions in the form of trade embargoes enacted and enforced against Cuba.<sup>30</sup>

An economic embargo was first enacted under the Kennedy Administration.<sup>31</sup> In 1963 Congress enacted the Cuban Assets Control Regulations (CACRs) as a means to closely monitor restrictions on "almost all commercial, financial, or trade transactions, either direct or indirect, with Cuba by persons within the United States."<sup>32</sup> Two decades later, the

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<sup>27</sup> See *id.* at 210; see also Smith, *supra* note 19, at 337.

<sup>28</sup> See AZICRI, *supra* note 4, at 210. See also Smith, *supra* note 19, at 337.

<sup>29</sup> See AZICRI, *supra* note 4, at 153. In fact, trade and economic aid from the Soviet Bloc have been a critical factor in the Cuban Republic's survival. See *id.* at 153-55 (estimating figures on how much economic aid and trade had been supplied by the Soviet Bloc from the early years of the Cuban Republic through the mid-1980s).

<sup>30</sup> Other covert means have included military operations, such as when the United States sent CIA-trained Cuban exiles to invade Cuba in the Bay of Pigs fiasco. *Id.* at 31. See also SHELDON B. LISS, *FIDEL! CASTRO'S POLITICAL AND SOCIAL THOUGHT* 100, 101 (1994) (noting that the Bay of Pigs invasion in April, 1961 is only one of the more blatant examples of numerous plots to undermine the Castro regime). About one and a half years following the Bay of Pigs invasion, the United States was thrown into crisis when Castro allowed the Soviet Union to place nuclear missiles in Cuba where they would be at close range to the United States. See AZICRI, *supra* note 4, at 31.

The United States, however, was not the only nation to economically sanction Cuba. The Organization of American States (OAS) imposed multilateral diplomatic and economic sanctions, in addition to suspending Cuba's membership in the OAS in 1962. See Smith, *supra* note 19, at 337, 340. The United States, however, has been the most adamant about sustaining and enforcing economic sanctions. Even though in 1975 the United States voted with the majority in the OAS to end the multilateral sanctions, the United States did not withdraw its own unilateral embargo. See *id.* at 340.

<sup>31</sup> See AZICRI, *supra* note 4, at 213.

<sup>32</sup> Herd, *supra* note 9, at 399-401. The CACRs implemented the trade restrictions by requiring exporters to obtain an export license from the Department of Treasury. See

Reagan Administration continued to strictly enforce the embargo.<sup>33</sup>

With the end of the Cold War, Cuba lost its Soviet economic aid.<sup>34</sup> This loss of aid caused a significant decline in the Cuban economy.<sup>35</sup> Reports give different numbers and measure different components of the economy, but the bottom line is that Cuba's economy suffered.<sup>36</sup> The economy has experienced some recovery, but it is still in poor condition.<sup>37</sup> The weak position of the Cuban economy has been viewed by the U.S. government as an opportune time to pursue its policy of bringing about an end to the Castro socialist system and authoritarian government in order to establish a capitalist, democratic government.<sup>38</sup>

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*id.* at 401.

<sup>33</sup> See AZICRI, *supra* note 4, at 122. Additionally, the Reagan Administration supplemented its anti-Castro policy with efforts to have Cuba condemned in the United Nations Human Rights Commission for human rights violations. See *id.* at 214. The Reagan era has been viewed as one of the most tense periods in United States-Cuban relations. See Smith, *supra* note 19, at 348-49 ("[The Reagan Administration] adopted a policy of inflexible hostility toward Cuba . . . . Indeed, under the Reagan administration, U.S.-Cuban relations reached perhaps their lowest point since the open conflict at the Bay of Pigs and the near cataclysm of the missile crisis"). See also AZICRI, *supra* note 4, at 212 (noting the "unproductive hostility" of the Reagan Administration).

<sup>34</sup> See Bourque, *supra* note 7, at 192. See also Kevin Fedarko, *Open for Business*, TIME, Feb. 20, 1995, at 50.

<sup>35</sup> See Bourque, *supra* note 7, at 192. See also Fedarko, *supra* note 34.

<sup>36</sup> See David Adams, *Cubans See Light at End of Dim Economic Tunnel*, ST. PETERSBURG TIMES, July 28, 1996, at 2A [hereinafter *Cubans See Light*]. See also 22 U.S.C.A. § 6021(1) (West Supp. 1997) (Congressional Findings).

<sup>37</sup> See *Cubans See Light*, *supra* note 36. Cuban officials reported economic growth of 9.6% for the first half of 1996. Exports rose 30% and imports rose 50% in that same time period. These are Cuba's official figures, but some economists are skeptical of them. See *id.* Cuba's purchasing power had fallen from 1989-1993 from importing \$8.3 billion to \$2.1 billion, but started to increase again to \$2.4 billion in 1995. See *id.*

<sup>38</sup> See, e.g., Cuban Democracy Act of 1992, 22 U.S.C. § 6001(6) (1996). This Act is consistent with the longstanding United States policy regarding Cuba. It continues attempts to force economic and political reform in Cuba by erecting barriers to Cuba's ability to conduct necessary international commerce. Building upon already existing prohibitions on United States' domestic trade with Cuba, the Cuban Democracy Act extended the prohibitions to foreign subsidiaries owned or operated by United States nationals. It forbids American firms, wherever they are incorporated or located, from conducting financial or commercial transactions with Cuba. The Cuban Democracy Act angered many foreign nations that resented the United States extraterritorially applying its trade practices. See Herd, *supra* note 9, at 397. See also Allen DeLoach Stewart, Comment, *New World Ordered: The Asserted Extraterritorial Jurisdiction of the Cuban Democracy Act of 1992*, 53 LA. L. REV. 1389 (1993).



In light of the progression that U.S. policy has followed for over the past thirty years, the provisions of the Helms-Burton Act are not shocking proposals. After already prohibiting domestic trade with Cuba,<sup>39</sup> and extending that restriction to U.S.-owned or U.S.-controlled businesses that are located and incorporated in other nations,<sup>40</sup> the next logical step by the United States was to prevent foreign-owned businesses and investors from conducting transactions with Cuba. What may be considered shocking, however, is that Congress proceeded to enact the Helms-Burton provisions in the face of strong objections from the international community, thereby placing U.S. foreign relations with its closest allies at risk.<sup>41</sup>

### III. THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY (LIBERTAD) ACT

#### A. Title I

The effective purpose of the Helms-Burton Act is to reinforce the economic embargo against Cuba<sup>42</sup> and thereby undermine Castro's government. The Helms-Burton Act is a legislative expression of the U.S. isolationist approach. Title I of the Helms-Burton Act reaffirms the U.S. economic embargo of Cuba.<sup>43</sup> It reasserts the existing measures in effect under the Cuban Democracy Act of 1992 and the CACRs.<sup>44</sup> The Helms-Burton Act even takes the embargo a step further by codifying the economic embargo<sup>45</sup> so that, under the terms of the Helms-Burton Act, the

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<sup>39</sup> See Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1996).

<sup>40</sup> See Cuban Democracy Act of 1992, 22 U.S.C. § 6005(a)(1). See also Herd, *supra* note 9, at 406-07 & n.44.

<sup>41</sup> See Paul Magnusson, *Uncle Sam Isn't Playing Fair with the WTO*, BUS. WK., Mar. 10, 1997, at 38. Even more shocking is the extreme measures the United States appears willing to take in order to pursue the policies enacted in the Helms-Burton Act. U.S. officials threatened to boycott the World Trade Organization's hearing on the E.U.'s complaint regarding the Helms-Burton Act. See *id.*

<sup>42</sup> 22 U.S.C.A. §§ 6031-6046. For stylistic purposes I will refer throughout the text to subchapters I, II, III, and IV as Title I, II, III, and IV, respectively. This is how the four subchapters have been more popularly referred to in commentary on the Helms-Burton Act.

<sup>43</sup> *Id.* § 6032.

<sup>44</sup> See *id.* §§ 6032(a),(c).

<sup>45</sup> *Id.* § 6032. The Helms-Burton Act defines the "economic embargo on Cuba" to include all restrictions on trade, transactions, and travel with Cuba that have been imposed through section 620(a) of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(a) (1994); appendix section 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. § 5(b) (1994); The Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (1994) and any other provisions of law. *Id.* § 6023(7). The codification of the embargo

President cannot lift it without consulting Congress and determining that a transitional government is in power in Cuba.<sup>46</sup> Title I also encourages the President to apply sanctions against other countries that provide assistance to Cuba.<sup>47</sup> Title I includes a request for the President to instruct the United States Permanent Representative to the United Nations to propose to the Security Council a mandatory international embargo against Cuba.<sup>48</sup>

The Helms-Burton Act seeks not only to deny Cuba access to the U.S. economy, but also to isolate Cuba from the international economy. Additionally, the Helms-Burton Act opposes Cuba's membership in any international financial institution.<sup>49</sup> Moreover, if any of these financial institutions approve a loan or other assistance to Cuba, the United States threatens to withhold payment, in the same amount of such loan or assistance, to the institution.<sup>50</sup>

### B. Title II

Those who support the Helms-Burton Act hope that Cuba will eventually establish a democratically elected government. Title II of the Helms-Burton Act represents the goals that the United States is working toward in Cuba. The Helms-Burton Act states that one of its purposes is "to assist the Cuban people in regaining their freedom and prosperity as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere."<sup>51</sup> While Title II encourages the Cuban people to "empower" themselves,<sup>52</sup> Title I outlines U.S. plans to continue a policy of isolating Cuba and crippling its economy. Specifically, Title II presents a number of incentives to encourage the Cuban

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additionally includes all restrictions imposed through the Cuban Assets Control Regulations. *See id.* § 6032(c).

<sup>46</sup> 22 U.S.C.A. §§ 6032(h), 6064. Prior to Helms-Burton, the economic embargo of Cuba was implemented by the U.S. Department of the Treasury and through Executive Orders. *See* Cleary, Gottlieb, *supra* note 13, at 2. There are indications, however, that the President may still have discretion to modify the embargo because the Helms-Burton Act continues to empower the U.S. Department of the Treasury's Office of Foreign Assets Control to issue licenses allowing exceptions for people to engage in activity otherwise prohibited by the embargo. *See id.*

<sup>47</sup> 22 U.S.C.A. § 6032(a).

<sup>48</sup> *Id.* § 6031(2).

<sup>49</sup> *Id.* § 6034(a).

<sup>50</sup> *See id.* § 6034(b).

<sup>51</sup> *Id.* § 6022(1).

<sup>52</sup> *Id.* § 6061(3).

people to pressure its government to comply with U.S. demands.<sup>53</sup> Title II offers the Cuban people assistance which would be available to Cuba once it establishes a transitional government.<sup>54</sup> The assistance will consist of humanitarian, developmental, and other economic aid, as well as assistance in implementing a democratically elected government.<sup>55</sup>

The point at which Cuba is deemed to have established the desired system to warrant the assistance is determined according to criteria outlined in Title II. These criteria are rather extensive and would impose sweeping changes upon Cuba. To obtain the assistance promised in the Helms-Burton Act, Cuba would have to make dramatic reforms including: releasing all political prisoners; allowing human rights organizations to make inspections; dissolving the current Department of State Security; making public commitments to organize free elections; moving toward freedom of the press and right to private property; and beginning efforts to either return expropriated property or provide compensation to U.S. citizens from whom such property was taken.<sup>56</sup> Few commentators disagree with these goals; however, the radical changes required by these standards are unrealistic, at least in the short term. Therefore, the ambition of these aspirations may undermine progress toward change in Cuba rather than facilitate it.<sup>57</sup>

### C. Title III

Through the Helms-Burton legislation, Congress attempts to seal Cuba off from U.S. commerce and from non-U.S. commerce as well. The Cuban Democracy Act of 1992 asked foreign governments to cooperate with the U.S. policy by restricting their trade and credit relations with Cuba.<sup>58</sup> Title III of the Helms-Burton Act subjects those governments and foreign corporations who do not voluntarily cooperate with the United States to civil suits in U.S. courts.<sup>59</sup>

This third set of provisions indicates a concern for the property rights of U.S. citizens.<sup>60</sup> Many U.S. citizens have a stake in sorting out

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<sup>53</sup> *Id.* §§ 6061-6067.

<sup>54</sup> *Id.* § 6062.

<sup>55</sup> *See id.*

<sup>56</sup> *Id.* §§ 6065-6067.

<sup>57</sup> It has been suggested that expecting too much from Cuba and not offering enough in return contributed to failed attempts in the past to improve U.S. relations with Cuba. *See* Smith, *supra* note 19, at 349.

<sup>58</sup> *See* Cuban Democracy Act of 1992, 22 U.S.C. § 6003(a) (1996).

<sup>59</sup> 22 U.S.C.A. § 6082 (West Supp. 1997).

<sup>60</sup> *See id.* §§ 6081-6085.

their claims over lost property in Cuba.<sup>61</sup> The remedy provided in Title III grants U.S. citizens a right to sue in U.S. courts, thus claimants have easy access to a forum where they can assert their claims. This remedy, however, is only available to those whose claims involve an amount in controversy exceeding \$50,000, not including any interest on the original claim.<sup>62</sup>

A closer look at specific provisions in Title III indicates that obtaining compensation for victims of Cuba's expropriation practices is a peripheral goal of Title III and the Helms-Burton Act as a whole.<sup>63</sup> The underlying purpose of Title III is to enforce, on an international level, the U.S. policy of economically isolating Cuba. Evidence of such intent is found throughout the language of the Act. Congress states in its Title III findings:

"[T]rafficking" in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban government and thus undermines the foreign policy of the United States . . . to bring democratic institutions to Cuba through the pressure of a general economic embargo at a time when the Castro regime has proven to be vulnerable to international economic pressure.<sup>64</sup>

In effect, the Helms-Burton Act serves as a warning to those foreign nationals who would offset the effects of the U.S. embargo by investing in Cuba. To understand the controversy over Title III, it is important to notice that the burden of compensation for the expropriation victims falls upon foreign nationals acting contrary to U.S. policy. Although the Act

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<sup>61</sup> See Robinson et. al., *supra* note 8, at 37. Reports say the number of United States nationals with claims in Cuba that have been certified by the Foreign Settlement Claims Commission is 5,911 claims, worth over five-billion dollars. See *id.* In addition to the certified claims that are on file with the Foreign Claims Settlement Commission, Title II of the Helms-Burton Act requires the United States Secretary of State to submit a report to Congress including an estimate of the number and value of claims existing that are not certified. 22 U.S.C.A. § 6067.

<sup>62</sup> See 22 U.S.C.A. § 6082(b). This clause has provoked criticism from those who point out that a property owner had to have been "very rich to have owned anything of that value in Cuba in 1959," so that poorer property owners who suffered loss due to expropriation do not derive any benefit from this provision. See Rep. Reed, *supra* note 13, at E309 (containing excerpt from the WASHINGTON POST).

<sup>63</sup> Recognizing the "real" purpose of Title III does not make the Act, or any of the secondary goals asserted by its provisions, necessarily underhanded or illicit. Rather, such recognition enables a better understanding of the implications that stem from the means chosen to achieve the primary purpose.

<sup>64</sup> 22 U.S.C.A. § 6081(6).

clearly blames the Castro government for wrongfully taking property and causing loss to its owners,<sup>65</sup> under Title III of the Helms-Burton Act, Castro and his government are not held accountable. Of course, the Castro government is ultimately the target of this legislation, yet it is only through pressure exerted upon third-party nations that Castro will feel the effects of it.

The persons identified as potential defendants in Title III suits are those who "traffic" in property "confiscated" by the Cuban government on or after January 1, 1959. The Act defines "trafficking" broadly, encompassing a wide range of activities connected to the expropriated property, including selling or managing it, as well as profiting through the trafficking of another person.<sup>66</sup> For purposes of the Helms-Burton Act, "confiscated" refers to property nationalized, expropriated, or seized by the Cuban government on or after January 1, 1959, for which adequate and effective compensation has not been given.<sup>67</sup>

Congress notes in its findings that the State Department has notified foreign governments of the complications that would arise in trying to return the expropriated property to its original owners if the property is in the hands of third parties.<sup>68</sup> In addition to the notice that passage of the Act provides, the provisions themselves provide a three-month "grace period" from the date Title III becomes effective, during which potential defendants can dispose of their interests in the controverted property and

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<sup>65</sup> *Id.* § 6081(3).

<sup>66</sup> *Id.* § 6023(13). *See also* Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. 24,955 (1996). Trafficking does, however, require a knowing and intentional state of mind. 22 U.S.C.A. § 6023(13). *See also* Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 61 Fed. Reg. at 24,955.

<sup>67</sup> 22 U.S.C.A. § 6023(4). Currently, there is no uniform agreement among nations as to what constitutes appropriate compensation for expropriation of foreign property. However, the United States advocates the position that the appropriate compensation is "just" or "full" compensation. Just compensation under the Restatement (Third) of The Foreign Relations Law of the United States means an amount equivalent to the value of the property taken and paid at the time of the taking or within a reasonable time afterward with interest from the time of the taking. The United States also advances the position that the value of the land should be evaluated as either the fair market value or the going concern value. *See* Tim Gebert, *The Principles of Just Compensation For International Takings*, 4 J. INT'L L. & PRAC. 389, 394 -97 (1995). Although the Helms-Burton Act does not specifically define the standard for "adequate and effective" compensation, based on the U.S. position in the international debate on appropriate compensation, the standard is likely to be measured in terms of just or full compensation.

<sup>68</sup> *See* 22 U.S.C.A. § 6081(7).

avoid liability.<sup>69</sup>

The costs of ignoring pending liability are great. The amount for which an investor may be found liable is not based upon the benefits gained from use of the confiscated property. Instead, liability is measured as being whichever is greatest of three possible amounts: (1) the amount of the claim as certified by the Foreign Claims Settlement Commission;<sup>70</sup> (2) an amount determined by a court-appointed special master;<sup>71</sup> or (3) the fair market value, calculated as being either the current value of the property or the value of the property when confiscated plus interest, whichever is greater.<sup>72</sup> In certain circumstances liability may be tripled where either the claim is certified by the Foreign Claims Settlement Commission, or the claimant has sent official notice of intent to initiate the action under Title III and the defendant investor continues to traffic in the disputed property.<sup>73</sup>

President Clinton successively suspended enactment of Title III for two six months periods,<sup>74</sup> pursuant to a provision in Title III that grants him this suspension power.<sup>75</sup> Until the suspension expires, claimants hoping to finally receive compensation for their loss of property will have to wait to file their claims.

#### D. Title IV

Title III provides both a means to discourage investment in Cuba, and a remedy for those who have had their property expropriated; however, it is also a remedy that will take time, as it works through the court system. Title IV, which has already been put into effect,<sup>76</sup> is a more immediate mechanism to encourage cooperation by other nations. This provision of the Act requires the United States Secretary of State to deny

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<sup>69</sup> *Id.* § 6082(a)(1).

<sup>70</sup> The FCSC certifies claims according to statutory procedures. *See supra* note 25.

<sup>71</sup> The court-appointed special master may be the FCSC so that the same statutory procedures would apply. *See id.*

<sup>72</sup> Any of the three amounts used to measure the liability also additionally include interest, court costs, and reasonable attorneys' fees. *See* 22 U.S.C.A. § 6082(a)(1).

<sup>73</sup> *Id.* § 6082(a)(3).

<sup>74</sup> *See* Dennis Bueckert, *Clinton Delays Cuba Sanction Again*, MONTREAL GAZETTE, Jan. 4, 1997, at A1, available in 1997 WL 4603972. Reports on the April, 1997 U.S.-E.U. agreement say the President will continue to suspend enactment of Title III for the duration of his Presidency. *See* Tom Buerkle, *Bitterness Over U.S.-E.U. Trade Deal Proves It a Truce, Not a Settlement*, INT'L HERALD TRIB., Apr. 15, 1997, at 6.

<sup>75</sup> *See* 22 U.S.C.A. § 6085(b).

<sup>76</sup> *See* Maya Bell, *Expatriates Police Helms-Burton Violators*, SUN-SENTINEL (Fort Lauderdale), Aug. 5, 1996, at 6.

visas to any foreign national who deals in property in Cuba that is subject to a claim by a U.S. national.<sup>77</sup> This restriction also applies to people who work for corporations that have business dealings in Cuba involving land subject to expropriation claims.<sup>78</sup> Because Title IV was put into effect soon after passage of the Helms-Burton Act and not suspended like Title III, it has been the source of much contention between the United States and its allies.<sup>79</sup>

#### IV. PROBLEMS OF THE HELMS-BURTON ACT

Even prior to its passage, the Helms-Burton Act was the subject of controversy. The Act may seem to be just another piece of legislation in a long line of isolationist legislation dealing with Cuba; however, in light of the new climate that exists since the end of the Cold War, the hard-line approach the Helms-Burton Act takes toward Cuba and U.S. allies warrants critical examination.<sup>80</sup> Concerns have been raised over the extraterritorial aspects, with opponents pointing to the lack of authority the United States has to prescribe behavior of foreign persons or corporations outside of U.S. territory.<sup>81</sup> Third-party nations oppose the legislation, especially Title III, as being an unacceptable infringement on their sovereignty.<sup>82</sup> Additionally, there are concerns as to whether the Helms-Burton Act will be effective, or if it will raise more problems than it is worth in terms of foreign relations disputes,<sup>83</sup> U.S. trading opportunities<sup>84</sup> and hardships on the Cuban citizenry.<sup>85</sup>

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<sup>77</sup> See 22 U.S.C.A. § 6091.

<sup>78</sup> See *id.*

<sup>79</sup> See *E.U./U.S.: European and American Officials Clinch Deal to End Cuba Row*, EUR. REP., Apr. 16, 1997, available in 1997 WL 8516486. In the spring of 1997, the U.S. State Department had already alerted over 20 European businesses that they were in violation of the Helms-Burton Act, which could subject them to Title IV sanctions. See *id.*

<sup>80</sup> One comment made distinguishing the Helms-Burton Act from other instances of United States policy notes, "Why all the uproar? Isn't it business as usual for countries to enforce their views on the world, and doesn't the U.S. regularly throw its superpower weight around? Yes, Washington often berates other countries, promises benefits or denies privileges to get its way. But the Helms-Burton law . . . [is] something different. [It] threaten[s] to punish private individuals outside the U.S. who do not obey laws passes by Congress." Nelan, *supra* note 12.

<sup>81</sup> See David Adams, *A Fragile Truce on Cuba*, ST. PETERSBURG TIMES, Apr. 27, 1997, at 5D [hereinafter *Fragile Truce*]; John Rice, *Mexico Concerned by U.S.-Europe Pact over Helms-Burton Act*, ASSOC. PRESS, Apr. 18, 1997, available in 1997 WL 4862734.

<sup>82</sup> See Rice, *supra* note 81.

<sup>83</sup> See discussion *infra* Part IV.B.

<sup>84</sup> See discussion *infra* Part IV.C.

### A. Extraterritorial Jurisdiction

The suspensions of Title III have been attributed to pressure from the international community.<sup>86</sup> Even before the Helms-Burton Act was passed, foreign officials conveyed strong opposition, organizing lobbying efforts against the legislation's enactment.<sup>87</sup> Foreign officials contend that the Helms-Burton Act amounts to an extraterritorial effort to impose U.S. policy on other nations in violation of international law.<sup>88</sup> In this respect, the Helms-Burton Act is similar to the Cuban Democracy Act of 1992. The Cuban Democracy Act, which was motivated by the same anti-Castro policy, also was protested vigorously on grounds that it violated international law by legislating extraterritorially.<sup>89</sup> One complaint leveled against the Cuban Democracy Act is that the United States has no valid basis to assert jurisdiction over the foreign subsidiaries it seeks to regulate.<sup>90</sup> The same charge has been made over the Helms-Burton Act, this time in regard to the foreign investors Congress is attempting to regulate.<sup>91</sup>

There is no specific legislative body that codifies all the international legal principles that are binding upon every nation. Rather, international law is based upon custom, treaties or conventions, and general principles of law recognized by civilized nations.<sup>92</sup> Customary international law has identified five bases for prescriptive jurisdiction, including: (1) territorial; (2) national; (3) universal; (4) protective; and (5) passive personality.<sup>93</sup>

Territorial jurisdiction is the most common and non-controversial basis for prescriptive jurisdiction.<sup>94</sup> This theory of jurisdiction recognizes

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<sup>85</sup> See discussion *infra* Part IV.F.

<sup>86</sup> See Anthony Wilson-Smith, *Clinton's Concession*, MACLEAN'S, July 29, 1996, at 14.

<sup>87</sup> See *id.*

<sup>88</sup> See Steven L. Myers, *Clinton Troubleshooter Discovers Big Trouble from Allies on Cuba*, N.Y. TIMES, Oct. 23, 1996, at A1.

<sup>89</sup> See Herd, *supra* note 9, at 407.

<sup>90</sup> See *id.* at 428-29.

<sup>91</sup> See Nelan, *supra* note 12.

<sup>92</sup> See Statute of the International Court of Justice, art. 38(1), 59 Stat. 1055, 1060 (1945). See also Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 YALE J. INT'L L. 121, 122 (1990).

<sup>93</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 402 (1986). See also *United States v. James-Robinson*, 515 F. Supp. 1340, 1344 n.6 (S.D. Fla. 1981); Herd, *supra* note 9, at 410-12.

<sup>94</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 93, § 402 cmt. c.



that "each sovereign nation has the right to exercise jurisdiction and control over matters within its territory."<sup>95</sup> Since none of the investment activity the Helms-Burton Act seeks to regulate occurs within U.S. territory, this theory cannot provide a basis for jurisdiction under the Helms-Burton Act. Third party nations protesting the Helms-Burton Act base their opposition to the Act upon the theory of territorial jurisdiction and its related concepts. One of these concepts is territorial integrity, which gives a state "the right to demand that other states refrain from committing acts that violate the independence or territorial supremacy of that state."<sup>96</sup> The other concept is nonintervention, which "requires that a state not interfere with the internal or external affairs of another state."<sup>97</sup> By attempting to prohibit foreigners from investing in Cuba, Congress is interfering with the internal and external affairs of other states, infringing upon their territorial integrity.

The other four theories of jurisdiction are considered exceptions to the basic territorial principle based on extraterritorial principles.<sup>98</sup> Nationality jurisdiction, the second theory of jurisdiction, gives nations jurisdiction over their own nationals, wherever they are located.<sup>99</sup> In as much as the Helms-Burton Act seeks to extend U.S. prohibitions to foreign nationals and enforce its policies against persons who are not its own nationals, it does not rely on the nationality theory of jurisdiction.

The third theory of jurisdiction is universality. The universal theory is inapplicable to the Helms-Burton Act as well. This theory allows any nation to exercise jurisdiction over individuals who commit heinous acts that are universally condemned.<sup>100</sup> While expropriation without compensation is viewed unfavorably by some nations, it has not been condemned as a heinous act.<sup>101</sup>

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<sup>95</sup> Herd, *supra* note 9, at 410.

<sup>96</sup> *Id.* at 411.

<sup>97</sup> *Id.*

<sup>98</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 93, § 402 cmt. b; Herd, *supra* note 9, at 411; Stewart, *supra* note 38, at 1393-94.

<sup>99</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 93; Herd, *supra* note 9, at 411.

<sup>100</sup> See *United States v. James-Robinson*, 515 F. Supp. 1340, at n.6. (S.D. Fla. S.D. 1981); Herd, *supra* note 9, at 412. Acts that have been recognized as heinous enough to warrant universal jurisdiction include piracy. See *James-Robinson*, 515 F. Supp. at 1344 n.6, and torture, see *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 32 I.L.M. 106, 111-13 (9th Cir. 1992).

<sup>101</sup> See Gebert, *supra* note 67, at 390. In fact, international law recognizes the right of nations to expropriate property for public purposes. Debate regarding expropriations centers on the degree of compensation, not upon whether it actually should be given. See *id.*

The fourth theory of jurisdiction is called the protective principle. The protective principle grants a nation jurisdiction over a foreign national when that person's actions are directed against the security of the state.<sup>102</sup> This principle also fails to provide a basis for jurisdiction for the Helms-Burton Act.

The remaining theory of jurisdiction, passive personality principle, is applicable to the Helms-Burton Act; however, it fails to provide any recognized authority for extraterritorial jurisdiction exercised under the Helms-Burton Act. The passive personality principle "asserts that a state may apply law . . . to an act committed outside its territory by a person not its national where the victim of the act was its national."<sup>103</sup> In passing the Helms-Burton Act, Congress is trying to apply its laws to transactions taking place outside of the United States, between nationals that are not its own, based on the premise that these transactions will affect U.S. nationals who have claims to property involved in the transactions. Thus, the Helms-Burton Act fits within the passive personality principle of jurisdiction.

However, reaching that conclusion does not establish a valid jurisdictional basis for the Helms-Burton Act, as passive personality jurisdiction is considered somewhat dubious, at best, within international law. "The international community has not, by and large, accepted passive personality jurisdiction except as applied to terrorism - and that form of jurisdiction may resemble protective or even universal jurisdiction more than passive personality jurisdiction."<sup>104</sup> The United States joins the international community in not ratifying passive personality jurisdiction, except, perhaps, in cases of terrorism.<sup>105</sup> In *United States v. Columba-Colella*,

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<sup>102</sup> See Herd, *supra* note 9, at 412.

<sup>103</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 93, § 402 cmt. g.

<sup>104</sup> Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEX. INT'L L.J. 1, 13 (1993). Watson concedes that some nations have statutes that grant extraterritorial jurisdiction over crimes committed against their nationals. However, he asserts that these statutes are rarely exercised, so that any limited practice of passive personality jurisdiction would not be enough to amount to a rule of customary international law. See *id.* at 13-14. The Restatement (Third) of Foreign Relations Law of the United States acknowledges that the passive personality principle is not widely recognized for ordinary torts or crimes; although, it is gaining acceptance in cases of terrorism or assassination of state officials. See *id.* at 10; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 93, § 402 cmt. g.

<sup>105</sup> See Watson, *supra* note 104, at 11 ("[O]utside of terrorism, however, the United States still seems reluctant to embrace passive personality jurisdiction."). See also *James-Robinson*, 515 F. Supp. at 1344 n6 ("[P]assive jurisdiction exists in theory . . . but this concept has been generally rejected as a basis of jurisdiction in Anglo-

the Fifth Circuit explicitly rejected the passive personality principle as a sufficient basis to assert jurisdiction over a foreign national.<sup>106</sup> In its opinion, the court stated, "But that an act affects the citizen of a state is not a sufficient basis for that state to assert jurisdiction over the act."<sup>107</sup> In cases where the courts have recognized passive personality jurisdiction, there have either been extenuating circumstances or one of the other four types of jurisdiction was primarily relied upon.<sup>108</sup>

In sum, although arguments can be made in support of the validity of passive personality jurisdiction, they are only convincing as to terrorism, if at all. The Helms-Burton Act does not involve criminal activity, so it does not fall within the acceptable scope of passive personality jurisdiction.

### B. Legal and Diplomatic Conflicts

The trade embargo approach Congress has taken toward Cuba by passing the Helms-Burton Act is often used to pursue U.S. interests;<sup>109</sup> however, it is at the cost of relations with many other nations, both legally and economically. Helms-Burton Act opponents in the United States expressed concern in congressional committee sessions over international reaction to the Act's passage.<sup>110</sup> Moreover, U.S. business execu-

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American law"). For an example of passive personality jurisdiction used to prosecute terrorist activity, see *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

<sup>106</sup> 604 F.2d 356, 359 (5th Cir. 1979) (holding that United States district court lacked jurisdiction over an action based upon defendant's agreement, made in Mexico, to sell a stolen car that belonged to a U.S. citizen).

<sup>107</sup> *Id.* at 360.

<sup>108</sup> See *Abramovsky*, *supra* note 92, at 124. Such extenuating circumstances include crimes of conspiring to assassinate a U.S. congressman or other U.S. officials. See *id.* at 124-26 (referring to *United States v. Layton*, 509 F. Supp. 212 (N.D. Cal), *cert. denied*, 452 U.S. 972 (1981) and *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985)).

<sup>109</sup> In fact, there appears to be an increasing trend of using sanctions in U.S. foreign policy to address problems ranging from human rights abuses and terrorism to drug trafficking and environmental concerns. A recent report from the National Association of Manufacturers calculates 61 Congressional laws and executive actions enacted within the last four years against 35 countries for the purpose of punishing and changing the behavior of the targeted nations. See Jim Lobe, *U.S.-Trade: Corporations Mount Anti-Sanctions Campaign*, INTER PRESS SERV., Mar. 5, 1997, available in 1997 WL 7073989; Nancy Dunne, *Trade Sanctions Are Hurting U.S. Business, Congress Is Told*, FIN. TIMES, Mar. 5, 1997, at 4.

<sup>110</sup> See, e.g., *Markup on H.R. 927*, *supra* note 25, at 20 (testimony of Mr. Weiner, attorney-advisor in the office of the Legal Advisor, U.S. Dept. of State) (stating that the Title III mechanism for resolving claims with Cuba would "put us at odds with our

tives and associations have launched an anti-sanctions campaign, criticizing legislation such as the Helms-Burton Act for jeopardizing the status of U.S. businesses in the global marketplace.<sup>111</sup> Several nations, angered by the extraterritorial jurisdiction the United States has asserted over their nationals, have taken steps to protest the Act beyond just the mere expression of opposition.<sup>112</sup>

U.S. allies have been infuriated by the threat of legal action their businesses face under the Helms-Burton legislation for conducting business in Cuba.<sup>113</sup> The United States has faced retaliatory measures from several nations including the European Union (E.U.), Mexico and Canada. These measures have included "anti-boycott" legislation approved by the European Commission that makes it illegal for E.U. companies to comply with the Act and also grants companies the right to counter-sue in European courts.<sup>114</sup> Beyond these efforts to hinder enforcement of the Helms-Burton Act, nations also have taken actions to attack U.S. trade. The E.U. has been working on compiling a "blacklist" or "watchlist" of U.S. companies who file suits against European businesses and has been threatening to deny visas to representatives of those U.S. companies.<sup>115</sup>

Initial diplomatic missions sent by President Clinton to placate U.S. trading partners were not successful.<sup>116</sup> Tensions continued to exist.<sup>117</sup> As anticipated, after Clinton's re-election in November of 1996, trading partners put increased pressure on the President to suspend Title III for a second period.<sup>118</sup> With the trading costs at stake, this pressure was not easily disregarded.<sup>119</sup> Despite President Clinton's decision to suspend

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allies").

<sup>111</sup> See Lobe, *supra* note 109.

<sup>112</sup> See *infra* text accompanying notes 113-130 (discussing retaliation measures).

<sup>113</sup> See Bueckert, *supra* note 74.

<sup>114</sup> See *U.S.-E.U. Trade War Unlikely to Erupt*, SING. STRAITS TIMES, Aug. 17, 1996, available in 1996 WL 11720157. See also David Fox, *E.U. Strikes Back at Washington's Anti-Cuba Law*, THE HERALD (Glasgow), July 31, 1996, at 12, available in LEXIS, News Library (noting new proposals by the European Commission making it illegal for European companies or individuals to cooperate with any suits brought under the Helms-Burton Act).

<sup>115</sup> See Nelan, *supra* note 12; see also Fox, *supra* note 114; *U.S.-E.U. Trade War Unlikely to Erupt*, *supra* note 114.

<sup>116</sup> See Myers, *supra* note 88, at A1. During one diplomatic trip to Mexico, United States official Stuart Eizenstat was pelted with eggs. See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* Some even say that Canada entertains beliefs that Clinton will postpone Title III enactment permanently. See Wilson-Smith, *supra* note 86.

<sup>119</sup> In 1995, E.U. exports to the United States totaled \$137 billion (U.S.), and U.S. exports to the E.U. were \$124 billion (U.S.). See *U.S.-E.U. Trade War Unlikely to*

Title III a second time, U.S. allies continued to object to Helms-Burton as holding a sword over them.<sup>120</sup>

In addition to domestic measures, U.S. allies have taken their opposition to the Helms-Burton Act to an international level. Canada contemplated filing a challenge to the Helms-Burton Act under the North American Free Trade Agreement,<sup>121</sup> but postponed proceeding with any action until E.U. efforts to negotiate with the U.S. unfolded.<sup>122</sup> In November of 1996,<sup>123</sup> the E.U. initiated an action under the World Trade Organization (WTO), which was scheduled to be formally presented to the hearing panel on April 14, 1997.<sup>124</sup> The contention over the Helms-Burton issue escalated to a point where commentators feared that the WTO could be put at risk.<sup>125</sup> In response to the E.U.'s complaint, the United States argued that the WTO was not the proper body to consider the Helms-Burton issue because it is a political, foreign policy matter, not a trade issue.<sup>126</sup> The United States threatened to ignore any WTO ruling on the grounds that the matter is one of national security, and therefore inappropriate for WTO consideration.<sup>127</sup> Additionally, the United States also threatened to boycott the WTO hearing altogether.<sup>128</sup> Both of these actions would have established a negative example to other nations involved in WTO proceedings and could have resulted in seriously undermining the authority of the fledgling organization.<sup>129</sup> Moreover, the

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*Erupt*, *supra* note 114.

<sup>120</sup> See Bueckert, *supra* note 74.

<sup>121</sup> See *id.*

<sup>122</sup> See Lawrence Herman, *Canada Should Sit Tight as Helms-Burton Saga Unfolds: U.S. and E.U. May Agree on a Face-Saving Deal*, FIN. POST, Apr. 23, 1997 at 17, available in 1997 WL 4092893.

<sup>123</sup> See *E.U. Formally Tells WTO to Suspend Cuba-U.S. Trade Dispute*, DOW JONES NEWS SERV., Apr. 21, 1997, available in WESTLAW, AllNewsPlus.

<sup>124</sup> See *id.* The World Trade Organization is an international organization created in 1995 to settle trade disputes. See Magnusson, *supra* note 41. The WTO delayed appointing a three-member hearing panel in hopes that the E.U. and the United States would reach a settlement agreement about the Helms-Burton Act outside of the WTO Dispute Body. When no agreement was reached, the WTO proceeded in appointing the panel to hear the E.U.'s complaint against the United States. See *id.*; *Cuba: U.S.-Europe Move Towards Deal Over Cuba*, CARIBBEAN UPDATE, May 1, 1997, at 7-8.

<sup>125</sup> See Magnusson, *supra* note 41.

<sup>126</sup> See *id.*

<sup>127</sup> See *U.S. to Cite 'National Security' for Helms-Burton*, SUN-SENTINEL (Ft. Lauderdale), Feb. 25, 1997, at 8A, available in 1997 WL 3089658.

<sup>128</sup> See Magnusson, *supra* note 41.

<sup>129</sup> See *id.* Even if the United States insists on continuing the Helms-Burton law, it is not necessary to rebuff the WTO in order to do so. Should the WTO rule against

United States, who has filed more complaints with the WTO than any other nation, could have jeopardized its own position in proceedings based upon U.S. complaints of foreign market barriers.<sup>130</sup>

The United States did not carry out these threats, and the authority of the WTO remains in tact, because three days before the formal WTO hearing the United States and the E.U. reached a tentative agreement.<sup>131</sup> As part of the two-page "understanding," the E.U. suspended its WTO complaint.<sup>132</sup> In exchange, the United States promised to further suspend Title III for the duration of Clinton's presidency and to seek U.S. Congressional approval to amend the Helms-Burton Act.<sup>133</sup> The amendment sought by the E.U. would provide the President with power to waive the Title IV provisions which deny visas to foreign investors who are involved with disputed property in Cuba.<sup>134</sup> Another significant term of the agreement was a commitment by both the E.U. and the United States to try to negotiate a common policy on property seized by Cuba's Communist government.<sup>135</sup> October 15, 1997, was set as the deadline for these negotiations.<sup>136</sup> The goal of these negotiations was for the parties to develop rules for dealing with investments in expropriated property that can be extended globally through the Organization for Economic Cooperation and Development.<sup>137</sup>

Responses to the agreement varied.<sup>138</sup> Some critics pointed to the

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the United States, it cannot force the United States to repeal the Helms-Burton legislation. It can only levy a monetary fine. *See id.*

<sup>130</sup> *See* Magnusson, *supra* note 41.

<sup>131</sup> *See* R.W. Apple, Jr., *Split Over Cuba is Eased by U.S. and Europeans*, N.Y. TIMES, Apr. 12, 1997, at A1; *Administration to Seek to Amend Helms-Burton Act Trade: Tentative Compromise with European Allies Attempts to Avoid International Legal Fight Over Sanctions Against Cuba*, L.A. TIMES, Apr. 12, 1997, at D1.

<sup>132</sup> *See* Buerkle, *supra* note 74.

<sup>133</sup> *See id.*; *E.U./U.S.: European and American Officials Clinch Deal to End Cuba Row*, *supra* note 79.

<sup>134</sup> *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *See id.* *See also* Buerkle, *supra* note 74. Negotiations regarding the Helms-Burton issue were not completed as of the October 15, 1997 deadline. *See* Anne Swardson, *U.S., E.U. Make Trade Strides, But Fail to Reach Settlement*, WASH. POST, Oct. 16, 1997 available in 1997 WL 14707495. Nevertheless, the United States and the E.U. have continued efforts to reach a compromise to the dispute without involving the WTO. *See* U.S., E.U. MEET ON IRAN, CUBA TRADE FIGHTS, Dow Jones Int'l News Serv., Nov. 21, 1997, available in WESTLAW, 11/21/97 DJINS 16:57:00.

<sup>137</sup> *See* Buerkle, *supra* note 74.

<sup>138</sup> *See id.* (discussing strong reservations to the agreement as expressed by France, Spain, Italy, Belgium, and Luxembourg before the agreement was ultimately approved

vague language of the agreement and expressed doubts that it would be successful.<sup>139</sup> Indeed, since the provisions of the Helms-Burton Act were created by Congress, amending it would not be within President Clinton's power. Any amendment to the Helms-Burton Act would be subject to Congress's decision.<sup>140</sup> There was also some confusion on how strong of a stance the E.U. members would take against their own companies who make future investments in Cuban property.<sup>141</sup> Other critics of the agreement worried that it would be successful, at least in terms of avoiding a WTO decision on the matter.<sup>142</sup> These critics were disappointed because while there was the potential for a WTO ruling against the United States and a trade war with the E.U., there was also the potential for the United States to be forced into changing its policy toward Cuba and third-party nations that deal with Cuba.<sup>143</sup>

The United States may have to change its policy anyway, in order to continue avoiding WTO proceedings. Sir Leon Brittan, the E.U. Trade Commissioner, has insisted that if the United States does not satisfy its commitments under the April agreement, the E.U. would renew its complaint with the WTO.<sup>144</sup> In light of the stand-off that will likely occur between the United States and the E.U. if the United States fails to alter its policy toward third-party nations, it would be worthwhile both diplo-

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by the E.U. Member States).

<sup>139</sup> Robert White, a former U.S. ambassador and director of the Washington-based Center for International Policy, stated, "I don't think you can square the circle. You can't satisfy Helms and Europe." *Fragile Truce*, *supra* note 81.

<sup>140</sup> See *id.* At the time of the April agreement, members of Congress would not say whether they agree to amending the Helms-Burton Act. Although Eizenstat, the administration's official charged with handling Helms-Burton Act matters, said he had won broad support in Congress for the April agreement, Senator Helms stressed that he "in no way agreed to any dilution of the Helms-Burton law" and will "carefully examine any proposed deal that is reached." See *Administration to Seek to Amend Helms-Burton Act Trade*, *supra* note 131.

<sup>141</sup> U.S. officials have said that European nations were to take action to "inhibit" their companies from buying state-seized property in Cuba, while European officials have talked about measures merely to "discourage" such buying. See *Administration to Seek to Amend Helms-Burton Act Trade*, *supra* note 131. In April, following the U.S.-E.U. agreement, France signed an agreement with Cuba designed to protect French investment interests in Cuba. See *Trade Accord with Cuba is Signed*, CHI. TRIB., Apr. 27, 1997, available in 1997 WL 3543059.

<sup>142</sup> See *Buyers Heed After E.U.-U.S. Deal*, EMERGING MARKETS REP., May 8, 1997, available in WESTLAW, AllNewsPlus; *U.S. Can Escape Curse of Cuba*, SING. STRAITS TIMES, Apr. 29, 1997, available in 1997 WL 7210534.

<sup>143</sup> See *Buyers Heed After E.U.-U.S. Deal*, *supra* note 142.

<sup>144</sup> See Buerkle, *supra* note 74. But see *supra* note 136.

matically and economically for the United States to make some concessions to E.U. demands. Another alternative, should the Clinton Administration be unable to persuade a Republican Congress to amend the Helms-Burton Act, would be to submit to the WTO hearing and abide by its findings.<sup>145</sup> A WTO ruling condemning the extraterritorial Helms-Burton Act provisions would provide a strong incentive for Congress to amend the law, without giving the appearance that Congress is conceding to a Democratic Presidential administration. For Congress to defy a WTO ruling and refuse to make amendments would result in embarrassment to the United States and could cause the United States to be an unwelcome member of the WTO.<sup>146</sup>

An additional concern raised by U.S. parties opposed to the Helms-Burton Act is that of reciprocity. If foreign nations were to adopt similar laws, on the grounds that what is a legal mechanism for the United States is also a legal mechanism for others, U.S. investors abroad would face serious risks. Unless they could be assured of the ownership of property involved in their foreign investments, they could face the same type of suits as those designed under Title III.<sup>147</sup> Similarly, reciprocal legislation could be used to scare away foreign investors from the United States.<sup>148</sup>

### C. Business Interests Sacrificed

Not only has the Helms-Burton Act led to potential legal barriers against U.S. businesses in third party nations,<sup>149</sup> it also reinforces domestic legal barriers that preclude U.S. businesses from entering a viable Cuban market.<sup>150</sup> It has been estimated that when the Cuban embargo is

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<sup>145</sup> See *U.S. Can Escape Curse of Cuba*, *supra* note 142.

<sup>146</sup> See *id.*

<sup>147</sup> See *Markup on H.R. 927*, *supra* note 25, at 19-20.

<sup>148</sup> A hypothetical example would be if Canada, one of the strongest opponents to the Helms-Burton Act, were to pass legislation granting certain legal rights to Native Americans who become Canadian citizens. Canada could allow these naturalized Canadian citizens to sue corporations over use of land that once belonged to Native Americans but was expropriated by the United States.

<sup>149</sup> See *supra* notes 114, 115, 121-24, 147, 148 and accompanying text (discussing retaliation measures initiated by U.S. allies). Beyond the retaliation legislation and the blacklists, sanctions may hurt U.S. businesses in a more general manner by damaging their credibility within the global marketplace. U.S. business people complain that the tendency for the United States to readily impose sanctions "give[s] American businesses the stigma of being unreliable." Lobe, *supra* note 109. As a report issued by the National Association of Manufacturers explains, "Foreign companies and governments are understandably reluctant to enter into any long-term commercial relationship with U.S. companies if the threat of sanctions looms." Dunne, *supra* note 109.

<sup>150</sup> See Fedarko, *supra* note 34. While some reporters indicate that most U.S.



finally lifted, U.S. business could total as much as one billion dollars in the first year.<sup>151</sup> Currently, American businesses are forced to forego hundreds of business opportunities, while foreign businesses take advantage by establishing trade and investments in Cuba without having to contend with U.S. competition.<sup>152</sup> Cuba presents economic potential for U.S. businesses in several areas including tourism, mining, telecommunications, and textiles.<sup>153</sup> In the meantime, the embargo not only remains in place, but has been tightened by the Helms-Burton Act.

#### *D. Ineffective Mechanisms Undermine Ultimate Goals*

Considering the breach of international legal principles attributed to the Helms-Burton Act, along with the conflict it has raised in the international community,<sup>154</sup> one would hope it will be worth all the trouble it has created. Unfortunately, many doubt that it will accomplish transition to democracy in Cuba or procure adequate and satisfactory compensation for expropriation victims.<sup>155</sup> The approach taken toward Cuba in the Helms-Burton Act, while perhaps more extreme in terms of international legal implications than in the past,<sup>156</sup> is not a new approach. Economic sanctions have been used against Cuba for over thirty years;<sup>157</sup> however, Castro remains in power. At the time of the Cuban Democracy Act of 1992 critics were against that legislation which sought to tighten the embargo at the cost of overstepping international legal bounds.<sup>158</sup> Congress, nevertheless, proceeded to enact the legislation, claiming it was

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companies are not interested in trade with Cuba, others indicate that there has been enough interest to prompt some companies to visit Cuba to start building potential business relationships and even to sign nonbinding letters of intent. *See id.*

<sup>151</sup> *See id.*

<sup>152</sup> *See id.* One Canadian company admitted, "A company of our ilk would never have the opportunity if we had to compete with American capital." *Id.*

<sup>153</sup> *See id.* *See also* Bourque, *supra* note 7, at 206 (noting that Cuba is rich in natural resources, offering an abundance of investment opportunities).

<sup>154</sup> *See supra* Part IV.A-B.

<sup>155</sup> *See* Rep. Reed, *supra* note 13, at E308; *Markup on H.R. 927, supra* note 25, at 13-15, 19-20 (statements by Mr. Hamilton and Mr. Weiner). *See also* Tom Carter, *Marxist Foe of Cuban Leader Says U.S. Policies Play into Dictator's Hands*, WASH. TIMES, Mar. 4, 1997, at A17; James W. Symington, *Why Not Smother Them with Cruise Ships?*, WASH. POST, Mar. 9, 1997, at C3.

<sup>156</sup> *See Cuba and U.S. Policy: Hearing Before the Subcommittee on the W. Hemisphere on Int'l Relations House of Representatives*, 104th Cong. 45 (1995).

<sup>157</sup> *See* Bourque, *supra* note 7, at 196-97; Smagula, *supra* note 3, at 66.

<sup>158</sup> *See* Trevor R. Jefferies, Comment, *The Cuban Democracy Act of 1992: A Rotten Carrot and a Broken Stick?*, 16 Hous. J. INT'L L. 75, 92-97 (1993).

necessary to achieve the policy goals in Cuba.<sup>159</sup> The fact that new legislation has been passed in follow-up to the 1992 Act indicates the 1992 legislation was not successful in achieving its desired effects on the Cuban economy or on Fidel Castro's leadership position. Many commentators feel that the 1996 legislation, which is based on the same policy, will not fair any better.<sup>160</sup>

Persons from all parties contend that it will not do any better. Congressman Jack Reed, in trying to persuade his colleagues to oppose the Helms-Burton Act, argued:

How best to hasten the end of the Castro regime? Regrettably, the bill before us is not the answer. Isolation has not been successful in ending the Cold War, and, indeed, it was not the course of action which resulted in the peaceful transition to democracy and market economies in Eastern Europe.<sup>161</sup>

Even the President of Cuba's legislature commented, "One of the United States' objectives is . . . development of a market economy . . . [e]verything in the Helms-Burton law conspires against the opening of the market in Cuba."<sup>162</sup>

Because many of the U.S. trading partners do not agree with the Helms-Burton sanction approach, the United States must proceed with sanctions in a unilateral fashion without international support. Many feel that unilateral sanctions are less likely to succeed than multilateral sanctions.<sup>163</sup> If third party nations continue their economic relations with Cuba, they will help to maintain Cuba in the face of the U.S. embargo.<sup>164</sup>

<sup>159</sup> See *id.*

<sup>160</sup> But see Lobe, *supra* note 109 (reporting on plans of a major foreign investor to pull out of Cuba due to the Helms-Burton law).

<sup>161</sup> See Rep. Reed, *supra* note 13, at E308.

<sup>162</sup> Robinson, *supra* note 8, at 37 (quoting Ricardo Alarcon, president of Cuban legislature).

<sup>163</sup> See Dunne, *supra* note 109 (stating that unless sanctions have broad multilateral support they are largely ineffective). See also *Law of International Sanctions*, *supra* note 2, at 172-73 (remarks by Kimberly Ann Elliott) ("[S]anctions tend to be most effective . . . [w]hen the sender and the target are friendly toward one another and conduct substantial trade . . . [s]uccess for individual sender countries increasingly depends on the subtlety, skills, and creativity with which sanctions are imposed — a test that the United States has frequently failed").

<sup>164</sup> See *Law of International Sanctions*, *supra* note 2, at 173 (remarks by Kimberly Ann Elliott). See also David M. Lampton, *Greater China and American Security*, in *GREATER CHINA AND U.S. FOREIGN POLICY: THE CHOICE BETWEEN CONFRONTATION AND MUTUAL RESPECT* 55, 64 (Thomas A. Metzger & Ramon H. Myers eds., 1996)

The insistence by the United States to continue the embargo is actually counterproductive<sup>165</sup> because it provides the Castro government more fuel to add to the anti-American fire that keeps Cubans supporting Castro.<sup>166</sup> Advocates of Helms-Burton who believe maintaining the embargo will hasten the end of the Castro government overlook Fidel Castro's ability to manipulate the embargo to his benefit.<sup>167</sup> By blaming Cuba's economic woes on the U.S. embargo, Castro is able to incite the Cuban people's anger away from himself and against the United States.<sup>168</sup>

### *E. Elusive Compensation Hopes For Expropriation Victims*

In addition to doubts expressed over the likelihood that the Helms-Burton Act will affect change in Cuba, there have also been doubts expressed over whether Title III will actually bring the relief that is hoped for by expropriation victims who file suits under Title III.<sup>169</sup> Any compensation that claimants do receive will likely take a long time to be determined due to massive numbers of claims that will have to be adjudicated in over-burdened courts.<sup>170</sup> With the likelihood that the number of claims will increase beyond the original number of claims existing under the Foreign Settlement Claims Commission, there is concern that the amounts due on valid original claims will be diluted in order to satisfy the large demand of so many claimants.<sup>171</sup>

While Title III may result in some compensation going to claimants, the cost of that compensation will be borne by foreign investors, not the Cuban government. This creates a perverse incentive for the Cuban government to stall any negotiations with the U.S. government regarding a settlement agreement to obtain compensation for claimants from the

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(discussing that other nations would not follow sanctions-based approach to Chinese human rights violations, thus contributing to the failure of U.S. sanctions against China).

<sup>165</sup> See Reginald Dale, *U.S. Sanctions Fad Cries for Restraint Thinking Ahead*, INT'L HERALD TRIB., Feb. 25, 1997, at 11.

<sup>166</sup> See Jefferies, *supra* note 158, at 93.

<sup>167</sup> See Fedarko, *supra* note 34.

<sup>168</sup> See Symington, *supra* note 155; Lobe, *supra* note 109.

<sup>169</sup> See Markup on H.R. 927, *supra* note 25, at 18-19 (statements of Mr. Patterson); Rep. Reed, *supra* note 13, at E308.

<sup>170</sup> See Markup on H.R. 927, *supra* note 25, at 13-15 (statements of Mr. Hamilton); Wilson-Smith, *supra* note 86 (discussing the "potential scale" of Title III actions); Rep. Reed, *supra* note 13, at E309.

<sup>171</sup> See Markup on H.R. 927, *supra* note 25, at 13-15.

Cuban government.<sup>172</sup> With Title III the Cuban government can sit back while claimants recover from foreigners, so that Cuba itself will not have to pay for the property it expropriated.<sup>173</sup>

#### F. Moral Concerns

Opponents of the Helms-Burton Act, and the Cuban embargo in general, have expressed concerns that restricting the inflow of goods and other economic resources into Cuba will not hasten democratic reforms or better circumstances for the Cuban people. Instead they fear it causes the Cuban people to suffer more hardship.<sup>174</sup> Cuban dissidents argue that the isolationist policy of the United States hurts the Cuban people because it serves as a pretext for the Cuban government to justify itself in carrying on a repressive government.<sup>175</sup> In fact, some dissidents have reported an increase in repression since the passage of the Helms-Burton Act.<sup>176</sup>

Lea Brilmayer, a law professor, has observed that the end of the Cold War brought about an increased level of security that changes the role of the United States.<sup>177</sup> The greater security that the United States enjoys now that the threats of the Cold War have dissipated, afford the nation greater freedom to act in a moral fashion.<sup>178</sup> Brilmayer writes:

Just as the end of the Cold War gave us room to act consistently with our basic moral principles, it also gave us greater responsibility . . . . It might have been an excuse at one time that a nation to which we refused assistance had someplace else to look — specifically the Soviet Union . . . . When Cubans had another source of aid and trade, our efforts to cut them off were more understandable . . . the United States is now in . . . a monopoly position. Some of our representatives in Washington seem to take this as an invitation to tighten the noose further. It should be taken as the opposite . . . . The fact that the United States is sometimes the only game in town gives rise to respon-

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<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See Bourque, *supra* note 7, at 194, 227. A student who travelled to Cuba as a part of a university-sponsored course on Cuba wrote of the experience, "I have seen what the (U.S. embargo) means to the public. It means that AIDS patients are dying because of a medicine which is only produced in the U.S. and is unable to get to the dying patients." Chomsky, *supra* note 9.

<sup>175</sup> See Carter, *supra* note 155.

<sup>176</sup> See *id.*

<sup>177</sup> See Lea Brilmayer, *Transforming International Politics: An American Role for the Post Cold War World*, 64 U. CIN. L. REV. 119, 133-34 (1995).

<sup>178</sup> See *id.* at 134.

sibilities that did not previously exist.<sup>179</sup>

According to Brilmayer's theory, the United States may have a moral responsibility to refrain from pursuing the isolationist policy exemplified in the Helms-Burton Act, because the United States is in the best position to help Cuba in its time of economic trouble.

#### V. ALTERNATIVE — ENGAGEMENT OF CUBA

A policy of gradually re-engaging in relations with Cuba presents a viable alternative to the U.S. policy of isolation. Accommodation between the United States and Cuba is not an impossibility. There were periods of limited gains in U.S.-Cuban relations in the past.<sup>180</sup> These attempts failed to achieve any lasting success in improving U.S.-Cuban relations because the United States expected too much, too soon.<sup>181</sup> This all-or-nothing attitude, which continues in the Helms-Burton Act, sought to force Cuba into making concessions to the United States before the United States would give reciprocal reassurances.

The third party nations that have been so critical of the Helms-Burton Act do agree with the United States that the Cuban system needs changes, but they clearly feel that the U.S. policy of isolation is not the way to effect such changes.<sup>182</sup> Canada's International Co-operation Minister, Pierre Pettigrew, stated, "We share with the Americans the wish to see Cuba become more democratic-although we obviously do not share the American view as to the means of achieving that."<sup>183</sup>

The theory underlying engagement is that once Cubans are exposed to U.S. products and ideas they will be more likely to see the problems with their own system and initiate reform on their own.<sup>184</sup> Opponents to the sanctions approach feel that the presence of American business people in non-democratic nations will serve as a positive influence toward democratic reform.<sup>185</sup> Cuban dissidents also favor engagement over the

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<sup>179</sup> *Id.*

<sup>180</sup> See AZICRI, *supra* note 4, at 212. Under the Carter Administration some limited gains were made toward engagement with Cuba, including: (1) opening Interest Sections in each nation's capital in 1977 to replace the embassies that had been previously withdrawn; (2) U.S. citizens were permitted to travel to Cuba; (3) the Dialogue Conference in November and December of 1978 which took place between the Cuban-American community and the Cuban government; (4) Cuban Americans were allowed to visit relatives who remained in Cuba. See *id.*; Smith, *supra* note 19, at 344-45.

<sup>181</sup> See Smith, *supra* note 19, at 349.

<sup>182</sup> See Wilson-Smith, *supra* note 86.

<sup>183</sup> *Id.*

<sup>184</sup> See Jefferies, *supra* note 158, at 93-94.

<sup>185</sup> See Lobe, *supra* note 109; Nancy B. Zucker, *China: Most-Favored-Nation Treat-*

Helms-Burton approach, believing that more open relations between the two nations will "erode Castro's ideological base and the institutional support required to maintain it."<sup>186</sup>

To gain a better understanding of why engagement is a beneficial alternative to isolationist embargoes, a comparison between Cuba and other nations that the United States has sanctioned, or has considered sanctioning, would be helpful.

#### A. *South Africa*

The case of South Africa is one of the few instances in which opinions indicate sanctions were effective.<sup>187</sup> The United States officially instituted its most comprehensive sanctions against South Africa in 1986 under the 1986 Anti-Apartheid Act.<sup>188</sup> Proponents of the Helms-Burton Act could argue that since the economic sanctions approach worked in South Africa, South Africa serves as an example of why the Cuban embargo should be continued. In support of such an argument, they could point out that prior to the 1986 Anti-Apartheid Act, the U.S. policy toward South Africa was that of "constructive engagement."<sup>189</sup> In 1986, the U.S. Congress overrode President Reagan's veto of the sanctions legislation which resulted in replacing Reagan's constructive engagement policy with the sanctions policy.<sup>190</sup>

However, such an argument ignores distinguishing factors that exist between the South Africa case and the Cuban case. The first factor is that U.S. sanctions against South Africa were imposed in cooperation with international multilateral sanctions.<sup>191</sup> The Helms-Burton legislation is a

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*ment and U.S. Policy on the Chinas (Capitol Hill Session)*, 87 AM. SOC'Y INT'L L. PROC. 432, 438 (1993) [hereinafter *China MFN Policy*] (statement by John C. Danforth (R-Mo)).

<sup>186</sup> Symington, *supra* note 155, at C3. See also Carter, *supra* note 155.

<sup>187</sup> See Gene Marlowe, *Economic Sanctions Results Often Puny, Seldom Punitive*, RICHMOND TIMES-DISPATCH, Mar. 8, 1997, at C1; *China MFN Policy*, *supra* note 185, at 440 (remarks by Sen. Danforth) (indicating that while he believes as a general rule that economic sanctions do not have positive effects, the case of South Africa varies from that general rule).

<sup>188</sup> See *Appropriateness of Sanctions*, *supra* note 6, at 313-14 (remarks of Donald Payne).

<sup>189</sup> See Peter C. Nwachukwu & Mfanya D. Tryman, *Constructive Engagement and South Africa: A Critical Assessment-1981-1985*, in APARTHEID SOUTH AFRICA AND AMERICAN FOREIGN POLICY 103 (Mfanya D. Tryman & Zuberi I. Mwamba eds., 1987).

<sup>190</sup> See *Appropriateness of Sanctions*, *supra* note 6, at 313 (remarks by Donald Payne).

<sup>191</sup> See Carter, *supra* note 155.

unilateral action on the part of only the United States.<sup>192</sup> The impact of multilateral versus unilateral makes a difference in effectiveness.<sup>193</sup>

Secondly, internal factors within South Africa differed from the internal factors present in Cuba. There was mass mobilization of the South African population against the Apartheid regime, which added internal pressure in addition to the external pressure of sanctions.<sup>194</sup> The dissidents in South Africa were not worried that they would suffer as a result of sanctions; rather, they actively called for the international community to continue sanctions.<sup>195</sup> In contrast, within Cuba there is little organized opposition to the Castro regime.<sup>196</sup> The dissidents who do remain in Cuba express opposition to the Helms-Burton Act and U.S. sanctions.<sup>197</sup> The dissidents prefer to see dialogue between the United States and the Castro government along with the opening of economic relations.<sup>198</sup>

In light of these distinguishing factors, the embargo policy as it transpired in South Africa is not applicable to Cuba.

### B. China

The U.S. relationship with China provides a more relevant example for dealing with the Cuban problem. Similar to the goals the United States has regarding Cuba, the United States seeks a transition in the Chinese government from an authoritarian communist regime to a democratic, free-market system.<sup>199</sup> This goal of democratization includes both economic and political reforms. The debate among U.S. foreign policy makers has been whether such reforms are best achieved through sanctioning China or through constructive engagement of the Chinese government.<sup>200</sup> Despite the horror of the Tiananmen Square massacre in 1989,<sup>201</sup> the Bush Administration adopted a policy of continued con-

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<sup>192</sup> See *id.*

<sup>193</sup> See *supra* notes 163, 164 and accompanying text.

<sup>194</sup> See *Appropriateness of Sanctions*, *supra* note 6, at 309, 313 (remarks by Jennifer Davis).

<sup>195</sup> See *id.* at 315 (remarks by Roger Wilkins).

<sup>196</sup> See Fedarko, *supra* note 34; Symington, *supra* note 155.

<sup>197</sup> See Symington, *supra* note 155; Carter, *supra* note 155.

<sup>198</sup> See Symington, *supra* note 155; Carter, *supra* note 155.

<sup>199</sup> See Morton Kondracke, *Engagement is the Right Strategy for U.S. with China*, SACRAMENTO BEE, Mar. 3, 1997, at B7. See also *China MFN Policy*, *supra* note 185.

<sup>200</sup> See Kondracke, *supra* note 199; *China MFN Policy*, *supra* note 185.

<sup>201</sup> In May of 1989 students began staging pro-democracy protests in Beijing. These protests gained widespread support as laborers, journalists, and other citizens travelled to Beijing to join in the demonstrations. The demonstrators filled the streets and

structive engagement under which the United States maintained political and economic ties with China.<sup>202</sup> Most significant in the constructive engagement policy has been annual renewal of China's Most-Favored-Nation (MFN) trading status, which has continued under the Clinton Administration.<sup>203</sup>

Under the policy of engagement with China, the United States has benefitted from economic relations with China. From the time of normalizing relations with China in 1979 to 1993, the value of U.S.-Chinese relations has increased from \$4 billion to \$25 billion.<sup>204</sup> As of 1993, China was the tenth largest export market for the United States, and it has become the fastest growing market for U.S. goods.<sup>205</sup> As China

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occupied Tiananmen Square in the heart of the city. In response, the Chinese government declared martial law. On the night of June 3, the Chinese government, in an effort to suppress the pro-democracy movement, ordered the People's Liberation Army to take military action and quash the demonstration. The soldiers opened fire on the demonstrators, killing and wounding thousands. This event is known as the Tiananmen Square massacre. See Harding, *supra* note 4, at 222-24.

<sup>202</sup> See *id.* at 224-25. Immediately after the Tiananmen Square massacre, President Bush did impose a series of sanctions on China including: warnings to U.S. citizens not to travel to China; suspension of military sales and exchanges; requests to international financial institutions to postpone all lending to China; suspension of all official communications with China above the level of Assistant Secretary; and sympathetic reviews of requests by Chinese students in the United States who wished to delay their return to China. While President Bush did impose these sanctions, he was against any stronger actions that could isolate China. In order to avoid isolating China, Bush attempted to maintain relations through direct phone calls to Chinese officials and through continuing civilian commerce. See *id.* at 225-27, 229.

<sup>203</sup> See Robbyn Reichman-Coad, *Human Rights Violations in China: A United States Response*, Note, 15 N.Y.L. SCH. J. INT'L & COMP. L. 163, 179-83 (1994). In each of the three years following the Tiananmen Square massacre in 1989, Congress attempted to either revoke China's MFN status or condition it upon certain human rights improvements. These attempts failed due to President Bush's veto of the legislation and lack of Congressional majority sufficient to override the presidential veto. See *id.* See also Harding, *supra* note 4, at 260-80. In 1993, President Clinton issued an executive order conditioning renewal of China's MFN status on improvement of China's human rights record. However, a year later, in 1994, Clinton decided to renew China's MFN status despite little progress in its human rights policies. Additionally, Clinton declared that future renewals would no longer be linked to human rights conditions. See Reichman-Coad, *supra* at 185; Nicholas Lardy, *U.S.-China Economic Relations, in GREATER CHINA AND U.S. FOREIGN POLICY: THE CHOICE BETWEEN CONFRONTATION AND MUTUAL RESPECT* 65, 71 (Thomas A. Metzger & Ramon H. Myers eds., 1996).

<sup>204</sup> See *China MFN Policy*, *supra* note 185, at 433 (remarks by Robert T. Matsui).

<sup>205</sup> See Lardy, *supra* note 203, at 71. Calculation of China as the tenth largest export market includes goods first sold to Hong Kong and then reexported to China.



emerges as an increasing world power in terms of economics,<sup>206</sup> it is making advances toward a more accessible and free-market economy.<sup>207</sup>

Unfortunately, at the same time the Chinese Communist Party is fostering economic development, it is refusing to change its political system.<sup>208</sup> Human rights violations have continued in China since Tiananmen Square, despite the Chinese Government's claims to have taken steps to rectify their human rights problems.<sup>209</sup> China's continued violation of human rights has perpetuated the debate over China's MFN status.<sup>210</sup> While revoking MFN trading status is not as severe as a full trade embargo, such as is in place against Cuba, it would have a serious impact on commercial relations between the United States and China.<sup>211</sup> Revoking China's MFN status would subject Chinese goods entering the U.S. market to vastly higher tariffs, resulting in a dramatic reduction of Chinese exports to the United States.<sup>212</sup>

Currently, the Clinton Administration is continuing to engage in relations with China and has not revoked its MFN trading status.<sup>213</sup> The arguments against revocation of China's MFN status parallel arguments made against the Helms-Burton Act and the Cuban embargo.

The major arguments against denying China MFN status are based on economic concerns. If the United States denies China MFN status, China will respond in kind by denying the United States MFN status for U.S. exports to China.<sup>214</sup> With loss of MFN status, the United States

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Nicholas Lardy argues these transactions should be calculated in measuring China's value as an export market. *See id.*

<sup>206</sup> See Thomas A. Metzger & Ramon H. Myers, *Introduction to GREATER CHINA AND U.S. FOREIGN POLICY: THE CHOICE BETWEEN CONFRONTATION AND MUTUAL RESPECT* 1, 19 (Thomas A. Metzger & Ramon H. Myers eds., 1996). In 1993 China was surpassed only by the United States as a recipient of direct foreign investment. *See* Lardy, *supra* note 203, at 65.

<sup>207</sup> *See China MFN Policy*, *supra* note 185, at 443 (remarks by William P. Alford); Reichman-Coad, *supra* note 203, at 186.

<sup>208</sup> *See China MFN Policy*, *supra* note 185, at 443 (remarks by William P. Alford); Reichman-Coad, *supra* note 203, at 186.

<sup>209</sup> *See* Reichman-Coad, *supra* note 203, at 163-77, 185-86. *See also* George Black, *Perspective on China*, L.A. TIMES, Mar. 10, 1997, at B5.

<sup>210</sup> *See* Kondracke, *supra* note 199. *See generally China MFN Policy*, *supra* note 185.

<sup>211</sup> *See* Harding, *supra* note 4, at 260.

<sup>212</sup> *See id.* Estimates have predicted the reduction of Chinese exports to the United States could be as much as fifty percent. *See id.*

<sup>213</sup> *See* Kondracke, *supra* note 199.

<sup>214</sup> *See China MFN Policy*, *supra* note 185, at 438 (statement by Sen. John C. Danforth).

will be forced to forfeit a large part of its share in the Chinese market, thereby leaving room for foreign competitors to take over that market.<sup>215</sup> Since third party nations are unlikely to follow the United States in denying China MFN status, foreign businesses will benefit from economic opportunities that U.S. businesses will be foreclosed from enjoying.<sup>216</sup> This competitive advantage is currently enjoyed by foreign businesses investing in Cuba who do not have to contend with U.S. competition due to the Cuban embargo.<sup>217</sup>

A second argument raised against revoking China's MFN status is that it will hurt the very people it is intended to help.<sup>218</sup> Reducing Chinese exports to the United States would result in hurting the small-scale private and collective industries developing in China rather than the large, state-owned industries that produce goods that remain for sale mainly within the domestic China market.<sup>219</sup> Additionally, in the wake of such strong action by the U.S. government, the Chinese government would be likely to tighten political controls over its people to discourage pro-democracy sentiments.<sup>220</sup> This response of increased political control has been the response of the Cuban government toward its people since passage of the Helms-Burton Act.<sup>221</sup> This argument takes into account that Chinese intellectuals within China oppose use of sanctions by the United States.<sup>222</sup> Likewise, U.S. policy makers should take into account the fact that dissidents within Cuba oppose embargo measures such as the Helms-Burton Act.<sup>223</sup>

U.S. policy makers also argue that once the United States has decreased economic relations with China by denying MFN status, one of the "best avenue[s] of influence" will be missing.<sup>224</sup> There will no longer be U.S. business people present in China to set good examples.<sup>225</sup>

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<sup>215</sup> See Harding, *supra* note 4, at 266.

<sup>216</sup> See *China MFN Policy*, *supra* note 185, at 438 (statement by Sen. John C. Danforth).

<sup>217</sup> See *supra* Part IV.C (discussing lost business opportunities for U.S. businesses in Cuba). Although the economic stakes for U.S. business in China may financially be greater than in Cuba, the loss of business opportunity in Cuba is still a prevalent concern for U.S. business people. See Fedarko, *supra* note 34.

<sup>218</sup> See HARDING, *supra* note 4, at 267.

<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> See *supra* notes 154-60 and accompanying text (discussing increased repression following passage of Helms-Burton).

<sup>222</sup> See HARDING, *supra* note 4, at 267.

<sup>223</sup> See Carter, *supra* note 155; Symington, *supra* note 155.

<sup>224</sup> *China MFN Policy*, *supra* note 185, at 438 (statement by Sen. John C. Danforth).

<sup>225</sup> See *id.*

This same argument regarding the positive influence of U.S. presence has been made in the context of the Cuban embargo debates.<sup>226</sup>

David M. Lampton, president of the National Committee on the United States and China, advises that it is in the interests of the United States to help China's economy to be successful.<sup>227</sup> Should China experience economic strife, Chinese migration would accelerate and cause problems internationally.<sup>228</sup> In light of all the problems the United States has experienced with masses of Cuban refugees,<sup>229</sup> it would be in the interests of the United States to improve Cuba's economic conditions, rather than strangle the Cuban economy through economic embargoes.

Finally, although Fidel Castro has not shown any signs of relinquishing political power over Cuba, he has made some tentative steps toward opening the Cuban economy.<sup>230</sup> It has been suggested that Cuba should emulate China in instituting measures toward economic freedom while retaining political control.<sup>231</sup> Sociological theories on the process of democratization suggest that immediate democratization may not be the most effective means to achieving lasting democracy.<sup>232</sup> One such theory suggests that perhaps "*perestroika* (economic and social reform) must precede *glasnost* (political freedom)."<sup>233</sup> According to this theory, certain social requisites have to take place in order to have democracy.<sup>234</sup> Economic modernization is only one of such requisites.<sup>235</sup> Non-democratic, authoritarian rule that maintains stability may be necessary while the other social requisites, such as cultural development and institutional growth, are taking place.<sup>236</sup> Thus, instead of democratization by means of an immediate, but unstable, overthrow of the non-democratic system, lasting democracy can occur through a gradual process of transitions.

Following from this theory is the conclusion that the reasonable

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<sup>226</sup> See Rep. Reed, *supra* note 13.

<sup>227</sup> See Lampton, *supra* note 164, at 59-60.

<sup>228</sup> See *id.*

<sup>229</sup> See George J. Church, *Cubans, Go Home*, TIME, Sept. 5, 1994, at 28; Bourque, *supra* note 7, at 193-94.

<sup>230</sup> See Fedarko, *supra* note 34; Church, *supra* note 229.

<sup>231</sup> See Church, *supra* note 229.

<sup>232</sup> See Thomas A. Metzger, *The U.S. Quest for Morality in Foreign Policy and the Issue of Chinese Democratization*, in GREATER CHINA AND U.S. FOREIGN POLICY: THE CHOICE BETWEEN CONFRONTATION AND MUTUAL RESPECT 84, 87 (Thomas A. Metzger & Ramon H. Myers eds., 1996).

<sup>233</sup> *Id.*

<sup>234</sup> See *id.*

<sup>235</sup> See *id.* at 88.

<sup>236</sup> See *id.* at 87-89.

approach to Cuba would be to adopt a policy along the lines of the constructive engagement policy that has been pursued with China. Re-establishing relations with Cuba by ending the embargo and engaging in economic relations will lead to further opportunities to promote political reforms through negotiations and dialogue.

## VI. CONCLUSION

Engagement, particularly on an economic level, is a reasonable means to work toward both economic and political reform in Cuba that avoids harm to U.S. businesses and the Cuban people. Furthermore, engagement with the Cuban government does not mean that victims of expropriation have to forfeit their claims to the property that was taken from them. Once the United States has engaged the Cuban government, the doors will be open for more cooperative agreements addressing the issue of compensation for victims of expropriation. Choosing an engagement policy over isolationist policy will also resolve many of the conflicts the United States has with its allies over the extraterritorial application of embargo laws, such as the Helms-Burton Act. A shift in policy would help to bridge the impasse that has developed between the United States and its allies.

